

OBJAComO

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

24 Cr. 542 (AS)

5 SEAN COMBS,

6 a/k/a "Puff Daddy,"

a/k/a "P. Diddy,"

7 a/k/a "Diddy,"

a/k/a "PD,"

8 a/k/a "Love,"

Oral Argument

Defendant.

9 -----x

10 New York, N.Y.  
11 November 19, 2024  
12 3:00 p.m.

13 Before:

14 HON. ARUN SUBRAMANIAN,

15 District Judge

16 APPEARANCES

17 DAMIAN WILLIAMS

18 United States Attorney for the  
Southern District of New York

19 BY: CHRISTY SLAVIK

MEREDITH FOSTER

MITZI STEINER

20 MADISON SMYER

Assistant United States Attorneys

21 AGNIFILO INTRATER LLP

22 Attorneys for Defendant

23 BY: MARC AGNIFILO

TENY GERAGIS

24 LAW OFFICE OF ANTHONY L. RICCO

Attorney for Defendant

25 BY: TONY RICCO

OBJAComO

Appearances (Continued)

SHAPIRO ARATO BACH LLP  
Attorneys for Defendant  
BY: ALEXANDRA SHAPIRO

SHER TREMONTE, LLP  
Attorneys for Defendant  
BY: ANNA ESTEVAO

OBJAComO

1 (Case called)

2 THE DEPUTY CLERK: Can counsel starting with counsel  
3 for the government please state their appearance for the  
4 record.

5 MS. SLAVIK: Good afternoon, your Honor. Christy  
6 Slavik, Meredith Foster, Mitzi Steiner, and Madison Smyser for  
7 the United States.

8 THE COURT: Good afternoon. And for the defense?

9 MR. AGNIFILO: Yes. Good afternoon, your Honor. You  
10 have Marc Agnifilo, you have Teny Geragos, you have our client,  
11 you have Tony Ricco, and you have Anna Estevao, and I expect  
12 any moment we'll have Alexandra Shapiro who is coming from the  
13 Second Circuit. And Sean Love Combs is with us today as well.

14 THE COURT: Good afternoon, Mr. Combs. And good  
15 afternoon to all of you. And that's fine for Ms. Shapiro when  
16 she arrives to join you at counsel table.

17 MR. AGNIFILO: Thank you, your Honor.

18 THE COURT: Mr. Agnifilo, and am I pronouncing that  
19 correctly?

20 MR. AGNIFILO: That's perfect. Perfect.

21 THE COURT: Okay. Mr. Agnifilo.

22 MR. AGNIFILO: Yes.

23 THE COURT: I received the application and the  
24 response from the government and your reply letter. So let me  
25 ask one question at the outset, and then I'll allow you to say

OBJAComO

1 anything additionally you would like to in support of your  
2 application.

3 Ultimately, what is it that you are seeking here in  
4 terms of relief?

5 MR. AGNIFILO: It's a good question, your Honor. And  
6 we're seeking relief in stages. I think at this point what we  
7 need is we need more fact finding. So in the first instance,  
8 we are going to want to know more about how it came to be that  
9 Mr. Combs's personal papers and his notes of meetings with his  
10 lawyers came into the trial team's possession. And the reason  
11 that's important is because the government has a version of how  
12 that happened that is very much at odds with our version of how  
13 that happened. And the reason it's significant is because it  
14 impacts, in my view, on the magnitude of the Constitutional  
15 violation.

16 There are a few different violations that we think are  
17 in the mix, and let me break them down, at least from my view,  
18 at this point. Your Honor, might have an additional view.

19 There's what we contend is a Fourth Amendment  
20 violation, because this was not a jail orchestrated search for  
21 the purposes of preserving order and safety in the jail.

22 So we contend that under the Second Circuit decision  
23 the 1986 case of *United States v. Cohen*, this is not a jail  
24 search. This is a search where the Second Circuit has held  
25 that Mr. Combs has an expectation of privacy in his personal

OBJAComO

1 effects, certainly in his legal notes. So there's a Fourth  
2 Amendment issue.

3 THE COURT: So let me stop you there.

4 MR. AGNIFILO: Yes, Judge.

5 THE COURT: You'll agree that this occurred during a  
6 BOP general sweep of the facility, right?

7 MR. AGNIFILO: It occurred while that was also  
8 occurring, yes.

9 THE COURT: So you're saying it was a pretext?

10 MR. AGNIFILO: That is what I'm saying, correct. Yes.

11 THE COURT: All right. Continue.

12 MR. AGNIFILO: Yes. So there's the Fourth Amendment  
13 component to it because we believe it was a pretext. There's  
14 an attorney/client privilege issue because Mr. Combs's notes  
15 were taken, were photographed I should say, were photographed  
16 and returned. Some number of those notes were given to a  
17 taint, team and then appears 19 pages of those notes were given  
18 from the taint team to the prosecution team and that's what we  
19 have now.

20 So there's an attorney/client privilege violation  
21 because the prosecution team has 19 pages of his notes. Or I  
22 should be more specific, it's 11 pages of his notes, and then I  
23 think it's 8 pages of a calendar book, and I think the two  
24 stand on different footing.

25 The thing that we don't know yet -- and my contention

OBJAComO

1 is we know enough now to find an attorney/client privilege  
2 violation and a Fourth Amendment violation. What we don't know  
3 yet is what really -- what led up to this. How is it that  
4 there were so many, if we look at it through the government's  
5 lens even, failures that led to the prosecution team having  
6 these 19 pages of material?

7 And there's a couple of things we don't yet know.  
8 One, we haven't been able to test the government's proffered  
9 explanation and we need certain things to do that. Some of  
10 those things is I think we need the surveillance video. I  
11 think we need the surveillance video of the search. The  
12 surveillance video of the search will tell us exactly who  
13 conducted the search, what they looked at, how long they were  
14 doing it, and we can see exactly how the search took place  
15 because there might be a surveillance video.

16 The other part that we don't have yet is  
17 communications between the U.S. Attorney's Office and the  
18 person dubbed as Investigator 1 or anybody else who might have  
19 been involved in the search of Mr. Comb's legal notes. That's  
20 important under -- it's important under the Fourth Amendment  
21 analysis to see what, if any, role the U.S. Attorney's Office  
22 played in conveying what photographs, what they should  
23 photograph, what they shouldn't photograph, why it was that  
24 this institutional search that was for weapons and drugs and  
25 contraband, illegal cell phones and the like, that was not

OBJAComO

1 what -- and these are Mr. Combs's legal files.

2 There's no reason to search these legal files for cell  
3 phones or weapons or drugs. And if you don't find cell phones  
4 or weapons or drugs in there, one is to put them back if one is  
5 really acting within the scope of my understanding of what this  
6 multiagency MDC sweep was all about.

7 So it is our contention, as your Honor eluded to, that  
8 the aspect of the search that impacted Mr. Combs and resulted  
9 in his legal papers being given to the prosecutors was all a  
10 pretext.

11 And I'll get to -- there's more I have to say about  
12 this, but your Honor asked me a direct question.

13 THE COURT: I'm trying to figure out the logistics and  
14 then I'm going to come back to what relief you're ultimately  
15 seeking, but let's keep it on the logistics.

16 MR. AGNIFILO: Sounds good.

17 So in the first instance, I think we need more fact  
18 finding. We don't know enough. We don't know the role the  
19 U.S. Attorney's Office played. We don't know exactly what  
20 Investigator 1 was doing. We're not completely sure that  
21 Investigator 1 was the one who conducted the search. The facts  
22 that have been proffered by the government are at odds with  
23 some of the facts that we understand in terms of who  
24 interviewed Mr. Combs and then who went about going to the area  
25 where his legal papers were.

OBJAComO

1           The surveillance will give us answers to some of these  
2 questions, as will the communications between the government  
3 and Investigator 1 or whoever was conducting the search.

4           Once we know that, then it may be that we have  
5 something amounting to an outrageous government conduct  
6 transgression under the Fifth Amendment. I can't tell the  
7 Court that we have that at this moment because I don't know  
8 enough. We might have a form of Sixth Amendment violation of a  
9 purposeful infringement of a pretrial detainee, attorney/client  
10 privilege, especially when it relates to trial strategy and  
11 investigation strategy.

12           So in the first instance, we're asking for further  
13 fact finding so that we know enough to come to your Honor and  
14 say this is a principled remedy. Now, it could be dismissal of  
15 the indictment. It could be recusal of the prosecution team.  
16 But we don't know enough to say which is a reasonable, measured  
17 remedy given the facts because we don't yet know all the facts.

18           THE COURT: Okay. And I understand that this was  
19 brought up as an emergency application principally because two  
20 excerpts from these documents were used in connection with the  
21 government's response to the renewed bail application, correct?

22           MR. AGNIFILO: That is correct, Judge.

23           THE COURT: So the relief you are seeking along those  
24 lines would be for me to not consider those, right?

25           MR. AGNIFILO: So I think in the first instance, to



OBJAComO

1 the extent that the trial team is in possession of Mr. Combs's  
2 notes, I think we have to make it so they're no longer in the  
3 possession of those notes. They could give them to us. They  
4 could give them to the Court. I don't really care what they do  
5 with them, but in order to protect the sanctity of the  
6 attorney/client privilege, I think I have an obligation to ask  
7 the Court to remove those materials from the trial team.

8 Now, in terms of the materials held by the taint team,  
9 we don't know yet what materials are held by the taint team.  
10 We've just never been told that. We've been told these 19  
11 pages went over to the trial team. We don't know what the  
12 taint team has. So as a preliminary issue, we would like to  
13 know what if any additional material is held by the taint team,  
14 what if any other material is in the United States Attorney's  
15 Office in the Southern District anywhere, and we want all of  
16 that material back while this is pending. And the reason I  
17 make that request is because we cannot put ourselves in a  
18 situation of having waived Mr. Combs's attorney/client  
19 privilege.

20 So we have to be as direct, and the word that comes to  
21 mind is aggressive, but I don't really mean aggressive. We  
22 have to be direct right off the bat and say no one should have  
23 any of this material other than Mr. Combs.

24 So in the short term, and what the emergent aspect is,  
25 is that part of it, your Honor.

OBJAComO

1 THE COURT: Okay. Understood.

2 Ms. Slavik, are you going to be speaking on behalf of  
3 the government?

4 MS. SLAVIK: I will, your Honor.

5 THE COURT: All right. So, first, maybe you can just  
6 fill me in on what happened here exactly.

7 MS. SLAVIK: Yes.

8 THE COURT: So I understand that there was this Bureau  
9 of Prisons sweep. Now, were there any communications prior to  
10 that sweep between anyone on the prosecution team and this  
11 investigator who photographed the notebook?

12 MS. SLAVIK: No, your Honor. As you note, the notes  
13 at issue, which are, excuse me, the 19 pages, which are 17  
14 separate documents, the 19 pages include two duplicates, those  
15 were recovered during a preplanned sweep of the MDC.

16 Now, the purpose of this sweep, and this is widely  
17 reported in the press, the purpose of this sweep was to address  
18 some of the issues that have persistently come up at the MDC.

19 THE COURT: No. I understand that. But I think what  
20 Mr. Agnifilo is saying is why were they taking photos of  
21 Mr. Combs's notebook.

22 MS. SLAVIK: Yes. To be clear, your Honor, no members  
23 of the prosecution team had any communication with the BOP  
24 investigator who was part of this MDC sweep.

25 THE COURT: Now, that being said, the investigator,

OBJAComO

1 the same one who photographed the notebook, was the person who  
2 was also monitoring Mr. Combs's communications in and out of  
3 the facility, right.

4 MS. SLAVIK: That's right, your Honor.

5 THE COURT: So he was focused on Mr. Combs in an  
6 investigatory capacity, fair?

7 MS. SLAVIK: In his capacity as a BOP investigator,  
8 yes, your Honor. His task -- he was tasked, as I understand  
9 it, with reviewing the defendant's communications, that  
10 includes the defendant's calls and that includes the  
11 defendant's e-mails.

12 THE COURT: Okay. So let's say that he thought of  
13 himself as an agent of the prosecution team, whether that's  
14 true or not, or whether that's how you saw it or not, and when  
15 he saw that there was this sweep and that he would have access  
16 to the cell and the locker and all of Mr. Combs's documents, he  
17 took it upon himself to, in his mind, aid the investigation  
18 effort by photographing these pages.

19 Would that, at least arguably, be a Fourth Amendment  
20 violation?

21 MS. SLAVIK: Your Honor, I don't think we can make  
22 that logical leap. And I say that because the BOP investigator  
23 works for the BOP. He has his own reasons for monitoring the  
24 defendant's communications. Those reasons include the safety  
25 of the institution. Those reasons include making sure that the

OBJAComO

1 defendant is in compliance with the BOP rules and regulations,  
2 which I note he was not. So the BOP has its own reasons for  
3 investigating the defendant's misconduct.

4 Now, it is true that the BOP has turned over  
5 materials. Those include calls, e-mails, and these photographs  
6 of notes to the U.S. Attorney's Office. But that was in  
7 response to grand jury subpoenas and document requests. That  
8 was not turned over in conjunction with some sort of shared  
9 investigatory purpose, if that makes sense, your Honor.

10 THE COURT: Okay.

11 MS. SLAVIK: And to be clear, the BOP investigator who  
12 was tasked with reviewing the defendant's phone calls and  
13 e-mails, he was at the MDC sweep. However, none of the members  
14 of the prosecution team were aware of that in advance. And  
15 none of the members of the prosecution team provided any sort  
16 of direction or instruction to the BOP investigator to do  
17 anything with respect to the defendant's personal belongings or  
18 personal space, nothing of the sort.

19 THE COURT: So when is the first time that the  
20 prosecution team became aware that photographs had been taken  
21 of Mr. Combs's notes.

22 MS. SLAVIK: That was after the conclusion of the MDC  
23 sweep.

24 THE COURT: But before the grand jury subpoena had  
25 issued?

OBJAComO

1 MS. SLAVIK: Correct.

2 THE COURT: Okay. So you knew that there were these  
3 documents and then you issued and then you pointed --

4 MS. SLAVIK: That's right. And then the government  
5 requested receipt of those documents.

6 THE COURT: Okay.

7 MS. SLAVIK: And I think, your Honor -- I'm happy to  
8 talk more about the circumstances of the BOP investigator  
9 recovering these notes, but I do think that it's important to  
10 note how the government treated these notes once the notes were  
11 in the government's possession.

12 THE COURT: But maybe this is related to that. Are  
13 these the only notes?

14 MS. SLAVIK: Yes, your Honor. This is the entirety of  
15 the notes. And just to --

16 THE COURT: So just to be very clear.

17 MS. SLAVIK: Yes.

18 THE COURT: Because Mr. Agnifilo raised this as an  
19 issue for discovery, but maybe we can short circuit that,  
20 there's nothing else from the search?

21 MS. SLAVIK: So let me be clear, and I think I should  
22 clarify something that Mr. Agnifilo said. I think he said that  
23 defense team did not know what material was held by the taint  
24 team. I just want to correct that slightly.

25 The government made a production last night to defense

OBJAComO

1 counsel that's comprised of all the materials in the possession  
2 of the taint team, that includes calls, e-mails, and the  
3 entirety of the universe of notes.

4 That's separate from what the government attached to  
5 its letter yesterday. That's Exhibit A. Those 19 pages  
6 contain redactions, as the Court probably noticed. Those are  
7 the notes that were put over the privilege wall. In other  
8 words, those are the notes that were reviewed by the filter  
9 team and then passed to the case team.

10 So I have not seen the production that was made  
11 yesterday because those materials were in possession of the  
12 filter team. That production was made entirely through the  
13 filter team.

14 THE COURT: So why wasn't that done with respect to  
15 these 19 pages? I mean, this is getting to just a practical  
16 question, which is wouldn't the best course be for documents  
17 under these circumstances, if there's even a question of  
18 potential privilege, because these were legal pads stacked  
19 under a manila envelope -- manila folder that said legal. To  
20 just handle it in the way of: Filter team gets it, turns it  
21 over to the defense for their review so they can mark it as  
22 privileged, log it, you can challenge it under the  
23 circumstances. Why wouldn't that be the best way?

24 MS. SLAVIK: So, your Honor, I think there's an  
25 important point here, which is that these materials were

OBJAComO

1 obtained by the government in connection with the government's  
2 ongoing grand jury investigation.

3 The government has been very clear on the record at  
4 multiple appearances that this investigation is very much  
5 ongoing. And the government's investigation into the  
6 defendant's continued obstruction was ongoing. And so, you  
7 know, these materials were obtained pursuant to the  
8 government's ongoing covert grand jury investigation.

9 THE COURT: On the covert point.

10 MS. SLAVIK: Yes.

11 THE COURT: Just maybe you can help me out with this.  
12 Is it BOP procedure when documents are taken from an  
13 individual's cell to not take those documents, but rather to  
14 photograph them and then retain those photographs?

15 MS. SLAVIK: I'm sorry, your Honor?

16 THE COURT: Is it the usual course when a search is  
17 conducted in a BOP facility to photograph those documents as  
18 opposed to taking them? Because I think what the defense is  
19 saying is, if you had just taken the notebook, we would have  
20 known it was gone and then we would have challenged the taking  
21 of the notebook, and then maybe they would have gotten it back  
22 before the government used it offensively in a court pleading.  
23 I think that's what they're saying, but I haven't heard your  
24 response.

25 MS. SLAVIK: I don't know the answer to that, your

OBJAComO

1 Honor. What I would stress, though, is that the government  
2 received these materials in the normal course. Once we were  
3 alerted to their presence, the existence of these photographs,  
4 of the notes, the government requested the notes in connection  
5 with its ongoing covert grand jury investigation, which, you  
6 know, I don't think there's any obligation for the defense --  
7 or excuse me, for the government to notify defense counsel of  
8 its investigation into the defendant's ongoing criminal  
9 conduct.

10 And just one thing I just I do want to clarify for the  
11 record, I think I might have misspoke earlier. The government  
12 had previously spoken with the BOP investigator in connection  
13 with the calls and e-mails. I think I had, when I said the  
14 government had never spoken to him, what I meant was in the  
15 context of the MDC sweep.

16 THE COURT: That's what I understood your answer to  
17 be.

18 MS. SLAVIK: Okay. Thank you for that point.

19 Anyway, your Honor, I think the government received  
20 these materials in a completely appropriate channel, and what  
21 the government did then with the materials was also completely  
22 appropriate by sending them to the filter team.

23 Whenever we get new information, whether that is  
24 through a subpoena return, or a search warrant return,  
25 something provided by a witness, anything like that, if there's



OBJAComO

1 reason to believe that those documents may contain privileged  
2 information, the material first goes to the filter team. That  
3 is the practice of the U.S. Attorney's Office. That is the  
4 practice of this particular case team. And here, because the  
5 defendant has used monitored jail calls and unauthorized  
6 third-party messaging systems to communicate with his  
7 attorneys, the government took measures to ensure that its  
8 review of the defendant's materials would respect his potential  
9 privilege.

10 THE COURT: So let's say that these notes were  
11 verbatim notes of meetings that Mr. Combs had with his  
12 attorneys, how would you be able to figure out if the notes  
13 were privileged or not without asking the defendants? I mean,  
14 just explain to me how you would do that?

15 MS. SLAVIK: So, your Honor, I think the filter team's  
16 job is to do the best they can to make privileged  
17 determinations with what they have. And I will note for the  
18 Court that this filter process that I've been describing, that  
19 has been sanctioned and blessed by many district courts here in  
20 the Southern District.

21 THE COURT: Who is the filter team? I don't need  
22 names, but are these other attorneys in the U.S. Attorney's  
23 Office?

24 MS. SLAVIK: Exactly, your Honor. The filter team is  
25 led by an Assistant United States Attorney in the office and

OBJAComO

1 there's a filter team that is completely separate from the case  
2 team.

3 THE COURT: And am I correct that in terms of  
4 discovery in this case, to the extent that there are privilege  
5 issues that come up, the practice has been for the filter team  
6 to work with defense counsel to make the privilege calls so  
7 that documents that are privileged can be filtered out.

8 MS. SLAVIK: So yes and no, your Honor. No in that  
9 for a long time, this investigation was covert. We had a lot  
10 of information before charges were brought and the filter team  
11 was responsible for reviewing potentially privileged  
12 information and making privileged determinations with respect  
13 to that information. Those filter decisions were done without  
14 the input of defense counsel of course because the  
15 investigation was covert.

16 Since the defendant has been charged, yes. The filter  
17 team has provided information, potentially privileged  
18 information, to defense counsel, and there's been, as I  
19 understand it, I'm not part of the dialogue, but as I  
20 understand it, there's a dialogue between the filter team and  
21 defense counsel with respect to potentially privileged  
22 material. However --

23 THE COURT: Okay. I think you're going to give me the  
24 however.

25 MS. SLAVIK: I want to make that distinction between

OBJAComO

1 covert and overt. And in this context, this BOP material that  
2 was part of the government's covert grand jury investigation  
3 into the defendant's ongoing criminal conduct.

4 Now, of course, the government made this public when  
5 the defendant --

6 THE COURT: I don't understand that dividing line  
7 given that the defendant has been charged. Maybe you can help  
8 me out with it because especially under the circumstances where  
9 the thing that happens after the government receives these  
10 documents is the use by the government of those documents in  
11 response to a bail application in this case. And so it's --  
12 maybe you can help me understand the dividing line between what  
13 you're describing as a covert investigation and discovery in  
14 this case. Because the grand jury proceeding is what  
15 ultimately triggered this case. And so while I understand that  
16 the two may be proceeding in parallel, there's some blurred  
17 lines between the two, right?

18 MS. SLAVIK: Well, I mean, it's certainly true that  
19 the defendant has been charged, and so that part of the grand  
20 jury investigation is now overt. However, as stated multiple  
21 times on the record, the government's grand jury investigation  
22 continued into criminal conduct that was separate and apart  
23 from what's already been charged.

24 THE COURT: Well, let me ask it a different way: Is  
25 there any other situation, other than this one, where documents

OBJAComO

1 were taken from the defendant while he was in detention where  
2 this kind of issue would come up? Because any time you would  
3 seek documents from Mr. Combs, he would obviously know about it  
4 because you were subpoenaing documents from him or something  
5 else and so they would know about it. And then you could  
6 engage in these filtering protocols that you described working  
7 with defense counsel, etc.

8 It's only because of the particular nature of this  
9 search that Mr. Combs was not aware apparently at the time that  
10 his notebooks had been photographed. Fair?

11 MS. SLAVIK: I'm not sure that that is fair. I think  
12 that the government has multiple ways to access and obtain  
13 information in connection with a grand jury investigation,  
14 including many ways that are not obvious or overt to the  
15 defendant. And when the government is investigating that  
16 continuing criminal conduct, I don't think there's any  
17 obligation for the government to alert defense counsel that it  
18 is investigating ongoing criminal activity.

19 I certainly -- defense counsel has not provided any  
20 sort of authority for that sort of proposition. And I'm not  
21 aware of any either.

22 THE COURT: Okay. Turning to privilege, are any of  
23 these documents privileged in the government's view and do you  
24 have a case that you can share with me? And if you don't have  
25 it now, that's okay, I'll give you some time to find it.

OBJAComO

1 MS. SLAVIK: Yeah.

2 THE COURT: But given what you've heard from defense  
3 counsel, and I don't want to get too deep into the documents or  
4 the explanation because I think some of this is under seal, but  
5 is the government's position that these are just absolutely not  
6 privileged?

7 MS. SLAVIK: No, your Honor, not necessarily.

8 So I think, as I mentioned, the filter team's job is  
9 to do the best they can in terms of making privileged  
10 determinations with the information that they have. And let me  
11 just kind of run through what information they had with respect  
12 to the notes, these 19 pages.

13 First, the notes were from a notebook that was labeled  
14 "things to do." They were not labeled legal. They were not  
15 labeled attorney/client privilege.

16 Defense has suggested that the notebooks and the loose  
17 papers were meant to be in the manila folder labeled legal.  
18 First of all, you know, assuming that proximity to a folder  
19 labeled legal, means those papers should be considered "legal"  
20 I think there's good authority in this district that suggests  
21 that self-labeling something as attorney/client privilege or as  
22 legal does not automatically make the documents attorney/client  
23 privileged or legal.

24 So I think that's one important point.

25 THE COURT: Well, I think the response is that if you

OBJAComO

1 have a folder like this you really can't jam a bunch of legal  
2 pads in it. And the defense tried to have the facility give  
3 Mr. Combs a Redweld where he could have put all the documents  
4 inside. It's just that they didn't allow him to do that. And  
5 so he had the legal manila folder and it was sort of on top of  
6 the legal pads, but I understand.

7 MS. SLAVIK: Your Honor, we're talking about, you  
8 know, 11 pages of what the defense has argued is privileged.  
9 And, like I said, the label on the notebook is things to do.

10 So that's one thing. The notes also, on their face,  
11 I'm not sure if your Honor has gone through them, but the notes  
12 on their face do not obviously memorialize conversations with  
13 attorneys. The defendant has characterized them as notes to  
14 and with his attorneys, but I don't think that that is clear  
15 from the face of the notes.

16 Rather, these notes are pretty wide ranging. They  
17 include action items from non-attorneys, like family members  
18 and like financial advisors. Those would not be privileged.  
19 They include notes about family matters, family members'  
20 birthdays; that's not privileged. They include inspirational  
21 quotes; those aren't privileged.

22 So much of the content of these 11 pages of notes  
23 actually have nothing to do with this case at all. And so the  
24 filter team made determinations based on the information that  
25 they had and the context that they had, which includes, you

OBJAComO

1 know, what I just described.

2 Now, those determinations don't have to be perfect.  
3 In fact, the law in this space contemplates that mistakes could  
4 be made. And I would point the Court towards the *Lumiere*  
5 decision by Judge Rakoff.

6 So, you know, the government is happy to engage with  
7 defense counsel if they think that, as they clearly do, that  
8 some of these materials are privileged, but --

9 THE COURT: For present purposes, the defense argues  
10 that at the very least, that excerpts from the notes that are  
11 contained in the government's opposition brief are privileged.

12 So let's say I accept everything that you're saying.  
13 The filter worked as best it could. There's no bad faith  
14 involved. But you look at the explanations and everyone sort  
15 of agrees that those excerpts are privileged, what happens then  
16 with respect to the usage of those excerpts?

17 MS. SLAVIK: Well, so first of all, I disagree that  
18 the two excerpts used in the government's opposition brief are  
19 privileged, and I'm happy to get into why I think that.

20 THE COURT: We'll get into that next, but let's  
21 assume, I just want to understand how this works.

22 MS. SLAVIK: Yes, so assuming, of course noting my  
23 disagreement with your conclusion.

24 THE COURT: Yes.

25 MS. SLAVIK: That these notes would be privileged, the

OBJAComO

1 remedy would simply be to suppress the government's use of  
2 those notes. It wouldn't be to suppress the notes wholesale.  
3 It would just be to excise the privileged aspects of the notes.

4 THE COURT: Okay. Understood.

5 As a matter of just strategy or just kind of to avoid  
6 the time and resources involved in further examination of those  
7 two excerpts, would the government simply say we believe we  
8 have a strong opposition, we don't need to rely on these two  
9 excerpts, so we will just not rely on them and the Court need  
10 not consider them?

11 MS. SLAVIK: Your Honor, I think that's right. I  
12 think that the government's brief --

13 THE COURT: I mean, are you willing to take that  
14 position? Meaning that, look, this issue has been raised.  
15 Rather than get deep into it when we have these other issues  
16 and a lot of other things happening, the Court simply need not  
17 consider those two excerpts in considering the government's  
18 opposition to the bail application?

19 MS. SLAVIK: I think that's right, your Honor. I  
20 think for the purposes of the bail hearing that's scheduled for  
21 Friday, the government's position is that the Court need not  
22 consider the two excerpted notes. The government's opposition,  
23 as your Honor is well aware, sets forth multiple examples of  
24 the defendant's continued obstruction and interference with the  
25 integrity of these proceedings. There's no need for the



OBJAComO

1 government to rely on these two examples.

2 THE COURT: Okay. So then next question: If you're  
3 not relying on them for that purpose, is there any issue in  
4 terms of giving those documents back? Or putting them in a  
5 vault and saying pending further investigation, if there is  
6 going to be an investigation, we don't need to rely on these.  
7 Because you point out a lot of what's in the notes are things  
8 like inspirational messages, things that have nothing to do  
9 with this case. There are pages of phone numbers, okay. And  
10 so it may be that you say, we'll put these into a vault or  
11 we'll hand these back to defense counsel. And we will, if we  
12 need to make an application at some later point in this case,  
13 we'll do that. But for these purposes, we're giving the notes  
14 back.

15 MS. SLAVIK: Your Honor, I think that these notes and  
16 specifically the two excerpts in the government's bail  
17 opposition, I think that they're related to the government's  
18 ongoing investigation into the defendant's obstructive conduct.  
19 And I think that they're evidence of the defendant's criminal  
20 conduct. So I would shy away from the Court's suggestion that  
21 we put them in a vault and lock them up.

22 You know, I think that the government's opposition  
23 brief is -- there's no need to rely on those two examples. But  
24 I think that the government would want to use those notes, the  
25 two examples specifically, in connection with its ongoing

OBJAComO

1 investigation.

2 And primarily, you know, just as a matter of  
3 procedure, I think that the defendant would have to make a  
4 motion before to ask for that relief. That's not my  
5 understanding of the relief that the defendant is asking for.

6 THE COURT: No, but you can always, to short circuit  
7 any future application and having to deal with it, you can  
8 agree that the Court or that the government would not consider  
9 those documents pending a further application. I mean, that's  
10 something you could do. So I'll ask you to consider that.

11 If you don't, for present purposes, I will understand  
12 that the government plans to retain the documents and to use  
13 them in its investigation unless the defendant makes an  
14 application and it's successful. But if you change your mind,  
15 just let everyone know because that could simplify things.

16 MS. SLAVIK: Understood, your Honor.

17 THE COURT: Now, in terms of whether the two excerpts  
18 are privileged, which I wanted to be sure I gave you an  
19 opportunity to get to, can you really say one way or the other  
20 if you don't have the explanation from the defense on the  
21 circumstances of those two excerpts?

22 MS. SLAVIK: I think we can, your Honor.

23 THE COURT: Okay.

24 MS. SLAVIK: And let me just, let me just explain why  
25 I say that. So first, the two excerpts relate to the defendant

OBJAComO

1 paying a potential witness and the defendant "finding dirt" on  
2 potential victims and witnesses.

3 So with respect to both of these notes, I think it's  
4 pretty clear that these are not attorney/client privileged.  
5 The attorney/client privilege obviously protects communications  
6 between the defendant and his attorneys for the purpose of  
7 obtaining or providing legal advice. I don't think that on  
8 their face either of these notes are indicative of  
9 communications to obtain legal advice.

10 So that brings us into work product territory, which  
11 is certainly broader than the attorney/client privilege, but  
12 it's not limitless.

13 Work product protection protects materials prepared by  
14 or at the behest of counsel in anticipation of litigation, and  
15 these materials don't fall under that category either.

16 So the focus of the work product privilege is really  
17 opinion material. Attorney opinion material to protect the  
18 attorney's mental processes so that the attorney can analyze  
19 and provide legal advice and prepare a client's case.

20 The note about whether a witness was paid or not is  
21 not opinion material and it's not mental processes. It's  
22 really an administrative question that has nothing to do with  
23 legal advice or strategy. And maybe, to put a finer point on  
24 it, the information at issue is not protected. Following up  
25 with a paralegal to determine whether a witness was paid off or

OBJAComO

1 not, that's not protected by a privilege.

2 THE COURT: You're saying paid off, but let me give  
3 you an example. Let's say that a potential individual had  
4 counsel that was being paid for in some capacity. And it was a  
5 legal arrangement that was in place and so that was what was  
6 being discussed, but those are the circumstances.

7 MS. SLAVIK: Sure. That fact of payment, not  
8 privileged. And I would argue that to the extent this is about  
9 the defendant paying off a witness, which is of course what the  
10 government is arguing, that would not -- that would fall under  
11 the crime fraud exception of any sort of privilege. Either  
12 attorney/client privilege or work product.

13 THE COURT: Please proceed.

14 MS. SLAVIK: The next note about finding dirt on  
15 potential victims and witnesses using a nonlawyer third party,  
16 that's similarly unprotected under the work product doctrine.  
17 And I think the context is particularly important here, and  
18 I'll just refer the Court to the first page of Exhibit A, which  
19 is where these notes are contained. The notes say: Find dirt  
20 on two different victims, and then refers to a nonlawyer third  
21 party. That individual is referred to in the government's  
22 brief as Individual 2.

23 So these notes come from the defendant's "things to do  
24 list" and many items in that notebook appear to be directed at  
25 nonlawyer third parties. I've kind of described that, like

OBJAComO

1 notes for family members to follow up on things, notes for  
2 financial advisors, things like that.

3 THE COURT: You would agree that defense counsel, when  
4 defending any criminal case, may be investigating people who  
5 they believe will feature heavily in the government's case.

6 MS. SLAVIK: Of course, your Honor.

7 THE COURT: You have to do that. It's malpractice not  
8 to do that.

9 MS. SLAVIK: Of course, your Honor.

10 THE COURT: So what if, again --

11 MS. SLAVIK: The defense is entitled to that.

12 THE COURT: So --

13 MS. SLAVIK: I'm sorry.

14 THE COURT: I'm sorry. No, please.

15 MS. SLAVIK: Like I said, here context is really  
16 important.

17 THE COURT: That's just, I understand the context  
18 you're pointing to and I guess the response from the defense  
19 may be if this was Mr. Combs's vernacular describing what I was  
20 talking about, which is that the defense team's efforts to make  
21 sure that they were well prepared to defend against the  
22 government's case and people that they thought would feature  
23 potentially in the government's case, then under those  
24 circumstances, which you might have no reason to know about  
25 because you just have the document, you would agree under those

OBJAComO

1 circumstances. Closer call whether it falls into the category  
2 of work product.

3 MS. SLAVIK: Sure. But here's why these notes don't.

4 First, the individual that is apparently, according to  
5 the notes, tasked with finding this dirt is a nonlawyer.  
6 Secondly, and this is noted in the government's brief, the  
7 defendant had a call with a family member on October 14th, in  
8 which he instructed the family member to work with this  
9 nonlawyer individual to "find everything" on victim two. So I  
10 think with those two pieces of context, I think it's clear that  
11 this operation is outside the context of the defendant  
12 defending this criminal case.

13 I think this is clear that the defendant is reaching  
14 out to nonlawyer third parties and, by the way, Individual 2,  
15 has never been identified by defense counsel as part of the  
16 defense team. We have a long list of individuals who act in  
17 the, you know, defense capacity. Individual 2 is not on that  
18 list.

19 THE COURT: Okay.

20 MS. SLAVIK: So I think that's important context.

21 THE COURT: Okay. And now I think that we have  
22 perhaps eliminated the emergent nature of this because the  
23 excerpts aren't being relied on in the government in opposition  
24 or to the bail application.

25 What is the government's position on turning over any

OBJAComO

1 communications between the government and investigator and the  
2 surveillance video? Which I think were the two things that  
3 Mr. Agnifilo mentioned. And is there any opposition to that?

4 MS. SLAVIK: Yes, your Honor, there is opposition to  
5 that.

6 THE COURT: I figured.

7 MS. SLAVIK: These are pretty extraordinary measures  
8 being sought by the defense. And at least by my perusal of the  
9 defendant's letters filed yesterday and today, there's  
10 absolutely no citation of any authority that supports the  
11 defendant's request for this extraordinary relief. So the  
12 government is very much opposed to those requests.

13 THE COURT: Well, I noticed that too. So why don't  
14 we -- is there anything further from the government?

15 MS. SLAVIK: Not unless the Court has any additional  
16 questions.

17 THE COURT: Mr. Agnifilo?

18 MR. AGNIFILO: Thank you, your Honor.

19 THE COURT: One question.

20 MR. AGNIFILO: Yes.

21 THE COURT: There was a declaration that the Court  
22 received ex parte and under seal.

23 MR. AGNIFILO: Yes, Judge.

24 THE COURT: Given that the government is in possession  
25 of the underlying documents, is there any reason why that

OBJAComO

1 declaration cannot be shared with the government, or some  
2 version of it so that the government has the context to  
3 determine whether there is actually a privilege that attaches  
4 to some portion of these documents?

5 Because, as I understand, Ms. Slavik, they want to  
6 work with you to try to resolve this. Now, you may disagree  
7 with that, but at some level, usually when you get an ex parte  
8 submission on a privilege application, it's because the other  
9 side doesn't have the documents so you can't really share the  
10 explanation with the other side without revealing the content  
11 of the document. They have the documents, so it seems like it  
12 might move things forward for you to share that declaration or  
13 some version of it with the government.

14 MR. AGNIFILO: So my concern with doing that, your  
15 Honor, is that we would be further giving the government  
16 insight into defense strategies, the significance of certain  
17 people who are mentioned in the notes, the significance of  
18 different things in the notes.

19 So your Honor has asked me a direct question, so I  
20 don't want to say no to you right off the bat. Let me talk to  
21 my colleagues about it and see if there's something we can do.  
22 But at the end of the day, we have an obligation to not  
23 exacerbate the attorney/client.

24 THE COURT: I agree.

25 MR. AGNIFILO: Yeah.



OBJAComO

1 THE COURT: I agree. It's just a question of whether  
2 the arguments you would make, and I'm going to give both sides  
3 a little homework here on the privilege issue.

4 MR. AGNIFILO: Right.

5 THE COURT: So if your argument on privilege didn't go  
6 to the importance of the material, but rather the  
7 circumstances, these were notes that were taken in meetings  
8 with counsel and pertain to legal strategy. At that level of  
9 generality, I don't think it would raise any sort of  
10 exacerbation concerns. So I think that that's just something  
11 to consider.

12 MR. AGNIFILO: Yes, and we will consider it because  
13 your Honor is asking us to consider it and we will.

14 THE COURT: Okay.

15 MR. AGNIFILO: So let me make two points.

16 I have brought the raw material. These are  
17 Mr. Combs's legal papers.

18 As Investigator 1 said, what we see here in this first  
19 folder it says "legal work." Some of these legal pads have --  
20 say "legal."

21 THE COURT: Well, you mean some of the legal pads say  
22 legal, not in connection with the fact that they are legal  
23 pads; you are saying they are actually marked as "legal?"

24 MR. AGNIFILO: It's not a Staples legal pad. It's  
25 actually handwritten the word. He's handwritten the word

OBJAComO

1 "legal."

2 THE COURT: Is that applied to the notebooks that  
3 these documents were taken from?

4 MR. AGNIFILO: So there are no notebooks. There are  
5 no notebooks.

6 THE COURT: Sorry, the legal pads that the photographs  
7 were taken.

8 MR. AGNIFILO: Right. So these legal pads, we have a  
9 folder that says "legal." On top of the legal pad he's  
10 handwritten in blue handwriting the word "legal." All these  
11 legal pads say "legal."

12 Now, part of the reason we need a hearing, and there  
13 are many, many reasons we need a hearing, is what the  
14 government is saying was searched is just not accurate.

15 THE COURT: Wait, let me just stop you for a second.

16 MR. AGNIFILO: Yes.

17 THE COURT: You saying the photographs that were  
18 taken, those pages were in legal pads that are marked as legal?

19 MR. AGNIFILO: Yes. Yes. They're marked as legal.  
20 They're marked as legal.

21 THE COURT: Do you have an example I can take a look  
22 at right here?

23 MR. AGNIFILO: One second, Judge.

24 Okay. I will give your Honor this -- I'll do it any  
25 way your Honor wants.

OBJAComO

1 THE COURT: I just want to see what you're talking  
2 about.

3 MR. AGNIFILO: One second.

4 All right. What I'm going to do, with your Honor's  
5 permission, I can give you the legal pad. And what I've done  
6 is I've premarked where one of the pages. I'll give this to  
7 your Honor.

8 And this was in a folder marked legal.

9 THE COURT: Okay. Mr. Hernandez, you can hand this  
10 back.

11 THE DEPUTY CLERK: Yes.

12 MR. AGNIFILO: Thank you.

13 So one of the very significant things about these  
14 notes is whenever one of Mr. Combs's lawyers goes to the jail  
15 to speak to him, he walks out sometimes with all of these notes  
16 in his hand, and sometimes with some subset of maybe one or two  
17 folders of notes in his hand. And two things then happen.  
18 One, he sits down with his lawyer and he says who wants to go  
19 through the list first. Sometimes I'll have things I want to  
20 say Ms. Geragos will do the same. Sometimes Mr. Combs has  
21 things in his list. So every single thing, virtually every  
22 single thing in these legal pads are things that he discusses  
23 with his lawyers.

24 Now, sometimes they are matters of trial strategy.  
25 Sometimes they're matters of what witnesses to interview.

OBJAComO

1 Sometimes they're matters of there's a certain person who knows  
2 this potential witness, you should speak to that person about  
3 what that third person nonlawyer might know about that  
4 potential witness that could possibly undermine that witness's  
5 credibility.

6 All of these things are discussed. We spend an  
7 inordinate amount of time with Mr. Combs, speaking with him  
8 about his legal case, every aspect of his legal case. And the  
9 reason that is so, is because this is a sweeping racketeering  
10 case. This racketeering case spans a long amount of time and a  
11 great amount of conduct. This is not a case that relates to  
12 say a single bank robbery that took place one day.

13 So we are studying this man's life. That's what we  
14 do. Day in and day out. We do that for trial preparation. We  
15 do that for the bail hearing. We are constantly talking about  
16 things that he's done, charities that he's involved in. We're  
17 talking about -- the government's talking about, well,  
18 sometimes it's about financial advisors. Well, sometimes  
19 that's related to bail. Sometimes that's related to how are we  
20 going to show the judge what his assets are, how are we going  
21 to show the judge what the house is worth.

22 This is not a single day, a single event case. This  
23 is an indictment of this man's entire life. So we spend, his  
24 lawyers spend, a tremendous amount of time covering every  
25 conceivable nook and cranny of this man's life. And I do have

OBJAComO

1 a case for the Court. And the case is called *United States v.*  
2 *Defonte*, D-E-F-O-N-T-E. It's at 441 F.3d, 92. It's from the  
3 Second Circuit from 2006. Very important case. In my view,  
4 dispositive of these issues. What the Second Circuit said in  
5 *Defonte*, is that when it comes to an inmate, and that inmate's  
6 notes, there are two types of notes that are 100 percent  
7 privileged. The first type is anything that is discussed with  
8 the lawyer. Everything in these notes is discussed with the  
9 lawyer. He comes out, Mr. Combs comes out, and he reads us his  
10 to-do list. That could be related to any one of a number of  
11 things.

12 If it's in this legal file, it is discussed with his  
13 lawyer. The *Defonte* decision makes clear as a bell that when  
14 that happens, that is privileged. The other thing that's  
15 privileged, not surprisingly, is whenever a lawyer says  
16 something to a client and the client writes it down, that  
17 happens in here, too.

18 One of the things that your Honor will see in the 19  
19 pages that the trial prosecutors have, is that they're the  
20 names of Mr. Combs's defense lawyers in those materials.  
21 Including different things that those defense lawyers have said  
22 to him. I'm not going to say them out loud because we have  
23 them in the declaration. But there's a point where one of the  
24 lawyers here at the defense table has an idea about a potential  
25 expert witness, who is a doctor, and who is retired. And he

OBJAComO

1 tells that to Mr. Combs. And Mr. Combs writes it down, and  
2 it's in Mr. Combs's notes that the trial prosecution now has.  
3 I cannot think of anything more in the heartland of  
4 attorney/client privileged material than a lawyer telling his  
5 incarcerated, waiting for trial client, here is the name of a  
6 potential witness, and the client thinks that's so important  
7 that he writes it down in his notes. The government has those  
8 notes. They have them, Judge.

9           They have notes related to who we have been tasked to  
10 call as potential witnesses. He gives us names. Sometimes  
11 it's first names. In the case of what the government has, it's  
12 first names. We know who they are because it's our job to call  
13 them. It's our job to call them and interview them. The  
14 government now knows potential defense witnesses for a May 5th  
15 trial. That's prejudicial. They shouldn't have it. It's  
16 heartland attorney/client privileged material that is now  
17 giving them an insight into the defense and they should not  
18 have it. And for them to get up here in front of your Honor  
19 and say we're right to have it, we don't want to give it back,  
20 we want to keep it and we even want to use it. That is the  
21 problem. That's the problem.

22           This has been a complete -- in the best of all  
23 circumstances, if we take intentionality and malice out of the  
24 equation, which I'm willing to do just for the sake of  
25 argument, this has been a complete institutional failure. The

OBJAComO

1 government says we want to work with defense counsel. You know  
2 when the time to work with defense counsel was? The time to  
3 work with us was when they got some of these notes. They have  
4 our phone number. They could have called us on the phone.  
5 Hey, Marc, hey, Teny, can we run these things by you, that  
6 crazy BOP search, we got all this stuff, can we tell you what  
7 it is so you can tell us what it's all about.

8 The fact that they didn't do that is not something to  
9 be glossed over, and I'm not suggesting your Honor is. Is not  
10 something to be glossed over. That is the problem.

11 THE COURT: Well, would you agree that in the context  
12 of the grand jury investigation, it's impossible for them to do  
13 that? I mean, you are asking, as I understand your request is,  
14 for purposes of this litigation, where the prosecution team  
15 comes into possession of documents that they may use in this  
16 case, those documents should be shared first with counsel for  
17 the defense.

18 Is that fair?

19 MR. AGNIFILO: So that's fair. But what I'm seeing  
20 the government do is something that is -- the best word for it  
21 is dangerous. They seem to be saying that if there's a covert  
22 investigation, somehow, they don't have to worry about the  
23 attorney/client privilege. That is, that is nothing that I  
24 have ever seen.

25 THE COURT: I don't think that that's what they're

OBJAComO

1 saying. They're saying that they use a filter team to filter  
2 out potentially privileged documents and that's a practice  
3 that's been accepted in this district for some time. And I  
4 haven't seen any authority from your side indicating that  
5 that's improper.

6 And, I mean, I'm going to give you a chance to provide  
7 that authority because I'm looking at the *Defonte* case and it's  
8 very helpful. It would have been nice to have that as part of  
9 the papers that were submitted.

10 But let me, Ms. Slavik, are you familiar with this  
11 case, the *Defonte* case?

12 MS. SLAVIK: I'm not, your Honor.

13 THE COURT: Okay. Let's do a few things.

14 MR. AGNIFILO: Your Honor, can I do one thing because  
15 Ms. Geragos has much more to do with the filter team than I  
16 have, and I think she has some insights that could be helpful  
17 for some of the insights that your Honor is asking.

18 THE COURT: Okay.

19 MS. GERAGOS: Your Honor, just one point, I just want  
20 to address notes and the covert -- their argument in terms of  
21 the covert grand jury investigation. After a search warrant  
22 was executed on Mr. Combs's hotel room, after he was arrested,  
23 they gave us a property receipt which we asked for and then we  
24 received, and there was a notebook that was recovered. We  
25 asked immediately for that notebook to be sent to the filter



OBJAComO

1 team, which it was. And so that material was seized after the  
2 indictment pursuant to a search warrant that was done after  
3 this grand jury indictment that he's arrested for. And we  
4 received that in discovery two days ago pursuant to our filter  
5 protocol.

6 And I think it's important because it's just at odds  
7 with what the argument is right now, which is that if there's a  
8 covert grand jury investigation, particularly related to  
9 Mr. Combs's notes, then the filter team would not have to check  
10 that with us. The filter -- they had Mr. Combs's notes from  
11 after an indictment that he's here sitting in jail on and that  
12 was sent to filter team and is not in the hands of the trial  
13 team prosecutors right now. So I just want to -- I want your  
14 Honor to have that data point with respect to his notes and  
15 notes that they have seized after he was indicted.

16 THE COURT: Understood. And, Ms. Slavik, as I  
17 understand it -- well, maybe you can tell me. What is the  
18 reason why these notes were not turned over to the defendants  
19 when they were first obtained? Meaning that the filter team  
20 had looked at them, they had filtered out what was not  
21 privileged in their view, provided you the balance, and then at  
22 that point, why didn't you just kind of package everything and  
23 provide it to the defense consistent with the Rule 16  
24 obligations?

25 MS. SLAVIK: Your Honor, like I said, these particular

OBJAComO

1 notes were obtained pursuant to the government's ongoing covert  
2 investigation. The materials, the notes that Ms. Geragos  
3 referred to previously, those were obtained pursuant to a  
4 search warrant in connection with the defendant's arrest.  
5 There was nothing covert about the seizure of those notes.  
6 This set of notes is very different.

7 And if I may, your Honor, just respond to a couple of  
8 the points that Mr. Agnifilo raised. We're talking here about  
9 11 pages of notes. We're not talking about a stack of  
10 notebooks, a stack of papers. We're talking about 11 pages  
11 that the defense has argued are privileged. None of those  
12 notes were labeled legal. The Court has those notes as Exhibit  
13 A.

14 THE COURT: Well, the notes themselves are not labeled  
15 legal, but at least the example that I received, that page was  
16 in a legal pad and at the top of the legal pad it was marked as  
17 legal.

18 MS. SLAVIK: Well, first of all, I'll note that the  
19 defendant retained all those notebooks, so it's not clear when  
20 that legal label was affixed to the notebooks. But, secondly,  
21 and more importantly, there's no authority that stands for the  
22 proposition that materials can become privileged by the simple  
23 expedient of labeling them as such.

24 THE COURT: That's fair.

25 MS. SLAVIK: That's a quote.

OBJAComO

1 THE COURT: That's fair. And I think that the real  
2 issue is not really -- is not primarily the labeling. It is  
3 the context in which those notes were taken. And I'm going to  
4 give you time to respond to it. But, you know, I think what  
5 I'm going to do here -- so just to be clear, what the  
6 prosecution team has are these 19 pages.

7 MS. SLAVIK: That's correct, your Honor.

8 THE COURT: Right. So pending further order of the  
9 Court, I'm going to order the prosecution to delete any  
10 versions of these notes that you may have. So get rid of them.  
11 So the government should not be in possession of them. The  
12 Court has a copy, and if there are originals that would be  
13 separately useful from the versions submitted to the Court,  
14 then those can be e-mailed to the Court for the Court's -- and  
15 the Court will retain it in its possession. But the government  
16 should get rid of all of those. So you won't have them.  
17 However, the Court will have them.

18 And so we will figure out the privilege issue. And  
19 let me ask, Mr. Agnifilo, given that we have a bail hearing  
20 coming up Friday.

21 MR. AGNIFILO: Yes, your Honor.

22 THE COURT: But I think we have eliminated any urgency  
23 in terms of that bail hearing given the representations from  
24 counsel and the steps that I'm taking today, so and because I'm  
25 sure counsel will be preparing for that and other things, in

OBJAComO

1 terms of running down the privilege and other issues, my sense  
2 would be to have briefing occur over the next few weeks. I  
3 don't think that there's a need to have everyone running around  
4 in the next 24 to 48 hours trying to find cases either in  
5 support or in opposition to some of the applications that have  
6 been made. I'll also note that the letters that the Court has  
7 received are a couple pages at most, and until this hearing  
8 service, not entirely clear what relief the defense was  
9 seeking.

10 Do you have any issue with that timeframe?

11 MR. AGNIFILO: Not at all, your Honor.

12 THE COURT: Okay. So what the Court will do, we'll  
13 put in an order indicating kind of a sequence of briefing on  
14 some of the issues that have been raised. You'll have an  
15 opportunity to raise authorities in support of any Fourth  
16 Amendment or privilege arguments that you would like to raise.  
17 We have the *Defonte* case. You probably have other cases you  
18 would like to rely on. You also have your request for certain  
19 evidentiary relief in terms of the video and communications  
20 between the government and the BOP investigator. And the  
21 government will have its chance to respond to that before we  
22 make any determination. But I don't think given these steps  
23 that there's a real urgency of the kind that was possibly at  
24 issue before the Court had this hearing.

25 Is that fair?

OBJAComO

1 MR. AGNIFILO: I think that's right. Your Honor dealt  
2 with the most urgent issue, which was in advance of the bail  
3 hearing for Friday, which I very much appreciate.

4 There's one other issue that I think is -- could also  
5 be urgent, which is we don't know whether any of this  
6 privileged material has been used in a grand jury presentation.

7 Now, I'm obviously not in a position to ask about that  
8 because I understand it's a sealed matter. But I do want to  
9 put the government on notice that if they're looking to seek an  
10 indictment or superseding indictment, you know, based on  
11 privileged material, we've put them on notice in open court on  
12 that and they proceed at their peril.

13 THE COURT: Well, Ms. Slavik, is anything -- without,  
14 I know you can't get into the details, but I mean, is anything  
15 happening with respect to these notes in the immediate future?

16 MS. SLAVIK: Your Honor, I won't get into details, but  
17 I hear the defense and I understand the request.

18 Just one point of clarification for the government.  
19 The directive that the Court just provided about the case team  
20 getting rid of these notes, my understanding is that that was  
21 not a directive towards the filter team, just because, you  
22 know, to the extent there's litigation about these notes, I  
23 think someone will have to have them. And my understanding is  
24 that the appropriate team within the U.S. Attorney's Office  
25 would be the filter team.

OBJAComO

1 THE COURT: And my understanding is that the filter  
2 team is not involved in either the grand jury investigation or  
3 this litigation, correct?

4 MS. SLAVIK: That's correct, your Honor.

5 THE COURT: Okay. So I think that that's fine.

6 Mr. Agnifilo?

7 MR. AGNIFILO: One other thing, in so far as time is  
8 passing and these law enforcement searches at the MDC were from  
9 I think it was October 28th until November 1st, I would ask on  
10 the record that the government ask, pending your Honor's  
11 ruling, that any surveillance video be preserved.

12 THE COURT: Ms. Slavik, I assume there's no issues  
13 there. Can you make that request to the Bureau of Prisons?

14 MS. SLAVIK: Yes, Judge.

15 THE COURT: Okay. Ms. Slavik, just one further  
16 question for you or maybe one of your colleagues relating to  
17 Friday's bail hearing, which is that the defense points to the  
18 *Jefferies* case in the Eastern District. And what they say is,  
19 look, just a month ago in the *Jefferies* case, the government  
20 proposed a bail package in a case that at least, from their  
21 perspective, mirrors this case in several dimensions. And  
22 their point is that in that proceeding, the government asked  
23 for a \$10 million bond and certain other restrictions, but they  
24 agreed that there was a set of conditions that would reasonably  
25 assure the appearance of the defendant. I don't know if danger

OBJAComO

1 to the community was at the forefront in that, at least the  
2 government's presentation there, but they point to  
3 circumstances of the alleged case there that are similar at  
4 least to circumstances of the case here.

5 In the government's response to the bail application,  
6 there wasn't much discussion or perhaps any to the *Jefferies*  
7 case, so that's one of the things that I hope on Friday you  
8 could inquire into, because obviously we have a prosecution  
9 ongoing in the Eastern District of New York and a proposal that  
10 was green lighted by the government there. So I wanted to just  
11 make sure that there was a reason for any distinction in the  
12 government's position in this case.

13 MS. SLAVIK: Yes, your Honor. The government's view  
14 is that that case is very different from the case here and  
15 we'll be prepared to address that in full at the hearing on  
16 Friday.

17 THE COURT: Okay. And, Ms. Slavik, any further issues  
18 that the government thinks we need to take care of here?

19 MS. SLAVIK: No, your Honor. Thank you.

20 THE COURT: All right. Thank you very much.

21 Mr. Agnifilo, any further issues?

22 MR. AGNIFILO: Yes, one last thing. I know our reply  
23 on the bail issue is due tomorrow. Would your Honor be open to  
24 maybe extending it for Thursday at noon since we've gotten a  
25 little detained on this other issue? Or is that cutting it too

OBJAComO

1 close for your Honor?

2 THE COURT: No, that's fine.

3 MR. AGNIFILO: Okay.

4 THE COURT: So Thursday at noon.

5 MR. AGNIFILO: Thursday at noon. Let me just check  
6 with my colleagues and make sure there's nothing else.

7 Thank you, your Honor. We have nothing else.

8 THE COURT: All right. Well, I appreciate everyone  
9 coming in. We will see you all here on Friday. That will be  
10 on the 26th floor on Friday. Thank you very much. We are  
11 adjourned.

12 (Adjourned)